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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
EASTERN DIVISION

BLANCA SOTO DE GUTIERREZ, } Case No. EDCV 17-1240-JDE  
Plaintiff, } MEMORANDUM OPINION AND  
v. } ORDER  
NANCY A. BERRYHILL, Acting }  
Commissioner of Social Security, }  
Defendant. }

I.

## INTRODUCTION

Plaintiff Blanca Soto de Gutierrez (“Plaintiff”) filed a Complaint on June 22, 2017, seeking review of the denial of her application for Disabled Widow’s Benefits by the Commissioner of Social Security (“Commissioner” or “Defendant”). The parties filed consents to proceed before the undersigned Magistrate Judge. On February 2, 2018, the parties filed a Joint Stipulation addressing their respective positions (“Jt. Stip”). The Court has taken the Joint Stipulation under submission without oral argument and as such, this matter now is ready for decision.

II.

## BACKGROUND AND ADMINISTRATIVE PROCEEDINGS

On July 30, 2013, Plaintiff applied for disabled widow's benefits,<sup>1</sup> alleging disability beginning August 28, 2012. Administrative Record ("AR") 171-77. After her application was denied initially and upon reconsideration, Plaintiff requested an administrative hearing. AR 92-96, 100-05, 106-08. Plaintiff, represented by counsel, appeared and testified at a hearing before an Administrative Law Judge ("ALJ") on February 10, 2016. AR 44-66.

On March 21, 2016, the ALJ issued a written decision finding Plaintiff was not disabled. AR 22-43. The ALJ found that Plaintiff had not engaged in substantial gainful activity since August 28, 2012. AR 30. The ALJ determined that Plaintiff suffered from the following severe impairments: “chronic vertigo; cervicocranial syndrome; degenerative joint disease of the lumbar spine; radiculopathy of the lumbar spine; and status post right rotator cuff repair.” Id. The ALJ found that Plaintiff did not have an impairment or combination of impairments that met or medically equaled a listed impairment. AR 31. The ALJ also found that Plaintiff had the residual functional capacity (“RFC”) to perform light work, with the following limitations (AR 32):

[Plaintiff] can lift and carry 20 occasionally and 10 pounds frequently; sit, stand, and walk for up to six hours each in an eight-hour day; can frequently use hand controls with right upper

<sup>1</sup> To be eligible for disabled widow's benefits, a claimant must: be the widow of a deceased worker, have attained the age of 50, be unmarried and have a disability that began before the end of the prescribed period. 20 C.F.R. § 404.335(e). The prescribed period ends the month before the month in which the claimant attains age 60, or, if earlier, either 7 years after the worker's death or 7 years after the widow was last entitled to survivor's benefits, whichever is later. *Id.* The ALJ found Plaintiff's prescribed period began on July 31, 2011, the date she was last entitled to survivor's benefits (AR 28) and found Plaintiff met the non-disability requirements for disabled widow's benefits and that her prescribed period ends on July 31, 2018. AR 30.

extremity; can engage in frequent reaching in all directions with the right upper extremity; can perform frequent handling and fingering with the right upper extremity; can engage in occasional postural activities but cannot perform climbing of ladders and scaffolds; should not be exposed to unprotected heights or moving mechanical parts; and should not operate a motor vehicle.

The ALJ found that Plaintiff was capable of performing her past relevant work as an electronics inspector (Dictionary of Occupational Titles ("DOT") 726.381-010). AR 37. The ALJ also made an alternative finding at step five of the sequential evaluation process, concluding that Plaintiff was also capable of performing other jobs that exist in significant numbers in the national economy, including: cafeteria attendant (DOT 311.677-010); toy assembler (DOT 731.687-034); inspector, hand packager (DOT 559.687-074). AR 38-39. The ALJ concluded that Plaintiff was not disabled from the alleged onset date through the date of the decision. AR 39.

Plaintiff filed a request with the Appeals Council for review of the ALJ's decision. AR 167-68. On May 18, 2017, the Appeals Council denied Plaintiff's request for review, making the ALJ's decision the Commissioner's final decision. AR 1-6. This action followed.

III.

## LEGAL STANDARDS

## **A. Standard of Review**

Under 42 U.S.C. § 405(g), a district court may review a decision to deny benefits. The ALJ's findings should be upheld if they are free from legal error and supported by substantial evidence based on the record as a whole. Brown-Hunter v. Colvin, 806 F.3d 487, 492 (9th Cir. 2015) (as amended); Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). Substantial evidence means such relevant evidence as a reasonable person might accept as adequate to support a

1 conclusion. Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007). It is  
2 more than a scintilla, but less than a preponderance. Id. To determine whether  
3 substantial evidence supports a finding, the reviewing court “must review the  
4 administrative record as a whole, weighing both the evidence that supports and  
5 the evidence that detracts from the Commissioner’s conclusion.” Reddick v.  
6 Chater, 157 F.3d 715, 720 (9th Cir. 1998). The standard of review is “highly  
7 deferential.” Rounds v. Comm’r Soc. Sec. Admin., 807 F.3d 996, 1002 (9th  
8 Cir. 2015) (citation omitted). “If the evidence can reasonably support either  
9 affirming or reversing,” the reviewing court “may not substitute its judgment”  
10 for that of the Commissioner. Reddick, 157 F.3d at 720-21; see also Molina v.  
11 Astrue, 674 F.3d 1104, 1111 (9th Cir. 2012) (“Even when the evidence is  
12 susceptible to more than one rational interpretation, [the court] must uphold  
13 the ALJ’s findings if they are supported by inferences reasonably drawn from  
14 the record.”). However, a court may review only the reasons stated by the ALJ  
15 in his decision “and may not affirm the ALJ on a ground upon which he did  
16 not rely.” Orn v. Astrue, 495 F.3d 625, 630 (9th Cir. 2007).

17 Lastly, even when the ALJ commits legal error, the Court upholds the  
18 decision where that error is harmless. Molina, 674 F.3d at 1115. An error is  
19 harmless if it is “inconsequential to the ultimate nondisability determination,”  
20 or if “the agency’s path may reasonably be discerned, even if the agency  
21 explains its decision with less than ideal clarity.” Brown-Hunter, 806 F.3d at  
22 492 (citation omitted).

23 **B. Standard for Determining Disability Benefits**

24 When the claimant’s case has proceeded to consideration by an ALJ, the  
25 ALJ conducts a five-step sequential evaluation to determine at each step if the  
26 claimant is or is not disabled. See Molina, 674 F.3d at 1110 (citing, inter alia,  
27 20 C.F.R. §§ 404.1520(a), 416.920(a)). First, the ALJ considers whether the  
28 claimant currently performs “substantial gainful activity.” Id. If not, the ALJ

1 proceeds to a second step to determine if the claimant has a “severe” medically  
2 determinable physical or mental impairment or combination of impairments  
3 that has lasted for more than 12 months. Id. If so, the ALJ proceeds to a third  
4 step to determine if the claimant’s impairments render the claimant disabled  
5 because they “meet or equal” any of the “listed impairments” set forth in the  
6 Social Security regulations. See Rounds, 807 F.3d at 1001. If the claimant’s  
7 impairments do not meet or equal a “listed impairment,” before proceeding to  
8 the fourth step, the ALJ assesses the claimant’s RFC, that is, what the claimant  
9 can do on a sustained basis despite the limitations from her impairments. See  
10 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4); Social Security Ruling (“SSR”)  
11 96-8p. After determining the claimant’s RFC, the ALJ proceeds to the fourth  
12 step and determines whether the claimant has the RFC to perform her past  
13 relevant work, either as she performed it when she worked in the past, or as  
14 that same job is generally performed in the national economy. See Stacy v.  
15 Colvin, 825 F.3d 563, 569 (9th Cir. 2016) (citing, inter alia, SSR 82-61); see  
16 also 20 C.F.R. §§ 404.1560(b), 416.960(b).

17 If the claimant cannot perform her past relevant work, the ALJ proceeds  
18 to a fifth and final step to determine whether there is any other work, in light of  
19 the claimant’s RFC, age, education, and work experience, that the claimant  
20 can perform and that exists in “significant numbers” in either the national or  
21 regional economies. See 20 C.F.R. §§ 404.1520(g), 416.920(g); Tackett v.  
22 Apfel, 180 F.3d 1094, 1100-01 (9th Cir. 1999). If the claimant can do other  
23 work, she is not disabled; if the claimant cannot do other work and meets the  
24 duration requirement, the claimant is disabled. See id. at 1099 (citing 20  
25 C.F.R. § 404.1560(b)(3)); see also 20 C.F.R. § 416.960(b)(3).

26 The claimant generally bears the burden at each of steps one through  
27 four to show that she is disabled or that she meets the requirements to proceed  
28 to the next step; the claimant bears the ultimate burden to show that she is

1 disabled. See, e.g., Molina, 674 F.3d at 1110; Johnson v. Shalala, 60 F.3d  
2 1428, 1432 (9th Cir. 1995). However, if the analysis reaches step five, at step  
3 five the ALJ has a “limited” burden of production to identify representative  
4 jobs that the claimant can perform and that exist in “significant” numbers in  
5 the economy. See 20 C.F.R. §§ 404.1560(c)(1)-(2), 416.960(c)(1)-(2); Hill v.  
6 Astrue, 698 F.3d 1153, 1161 (9th Cir. 2012); Tackett, 180 F.3d at 1100.

7 **IV.**

8 **DISCUSSION**

9 The parties present one disputed issue: “Whether the ALJ properly  
10 considered the consultative examiners’ opinions.” Jt. Stip. at 2. Plaintiff  
11 contends that the ALJ failed to provide specific and legitimate reasons for  
12 ascribing only partial weight to the opinions of two examining physicians. Id.  
13 at 4. The Commissioner argues that the ALJ accorded appropriate weight to  
14 these physicians’ opinions based on substantial evidence in the record. Id. at 7.

15 **A. Applicable Law**

16 In deciding how to resolve conflicts between medical opinions, the ALJ  
17 must consider that there are three types of physicians who may offer opinions  
18 in Social Security cases: (1) those who directly treated the plaintiff, (2) those  
19 who examined but did not treat the plaintiff, and (3) those who did not treat or  
20 examine the plaintiff. See 20 C.F.R. § 404.1527(c); Lester v. Chater, 81 F.3d  
21 821, 830 (9th Cir. 1996) (as amended). A treating physician’s opinions are  
22 entitled to greater weight because a treating physician is employed to cure and  
23 has a greater opportunity to know and observe the patient as an individual. See  
24 Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989).

25 “The treating physician’s opinion is not, however, necessarily conclusive  
26 as to either a physical condition or the ultimate issue of disability.” Id. “The  
27 ALJ may disregard the treating physician’s opinion whether or not that  
28 opinion is contradicted.” Id. For instance, “[t]he ALJ need not accept the

1 opinion of any physician . . . if that opinion is brief, conclusory, and  
2 inadequately supported by clinical findings.” Bray v. Comm’r of Soc. Sec.  
3 Admin., 554 F.3d 1219, 1228 (9th Cir. 2009) (citation omitted); Tonapetyan v.  
4 Halter, 242 F.3d 1144, 1149 (9th Cir. 2001). To reject the uncontradicted  
5 opinion of a treating physician, the ALJ must provide “clear and convincing  
6 reasons that are supported by substantial evidence.” Bayliss v. Barnhart, 427  
7 F.3d 1211, 1216 (9th Cir. 2005). Where the treating physician’s opinion is  
8 contradicted by another physician’s opinion, the “ALJ may only reject it by  
9 providing specific and legitimate reasons that are supported by substantial  
10 evidence.” Id. Likewise, the ALJ must provide specific and legitimate reasons  
11 supported by substantial evidence in rejecting the contradicted opinions of  
12 examining physicians. Id. The opinion of a non-examining physician, standing  
13 alone, cannot constitute substantial evidence. Widmark v. Barnhart, 454 F.3d  
14 1063, 1066 n.2 (9th Cir. 2006) (citing Lester, 81 F.3d at 831); Morgan v.  
15 Comm’r of the Soc. Sec. Admin., 169 F.3d 595, 602 (9th Cir. 1999).

16 **B. Analysis**

17 Plaintiff contends that the ALJ improperly ascribed only partial weight  
18 to the opinions of Drs. Lim and Sargeant, two consultative examining  
19 physicians. Jt. Stip. at 4. Specifically, Plaintiff argues that the ALJ failed to  
20 provide specific and legitimate reasons, supported by substantial evidence, for  
21 rejecting the opinions of these physicians. Id.

22 1. Summary of the Physicians’ Opinions

23 Dr. Sargeant examined Plaintiff on October 19, 2013 and found she  
24 suffered from: chronic vertigo; chronic low back pain; right rotator cuff tear  
25 status post-surgery; osteoporosis; and type 2 non-insulin dependent diabetes.  
26 AR 351, 355. Dr. Sargeant concluded that Plaintiff: could lift and carry 20  
27 pounds occasionally and 10 pounds frequently; could push and pull on a  
28 frequent basis; could walk and stand for two hours out of an eight-hour

1 workday; could sit for six hours out of an eight-hour workday; should not  
2 attempt long distance walking without the assistance of a cane or an  
3 individual, lest she risk falling; could climb, balance, kneel, and crawl  
4 occasionally; could walk on uneven terrain, climb ladders, and work at heights  
5 occasionally; had no limitations with respect to hearing or seeing and was  
6 unlimited in the use of her left hand, but was limited to frequent fine and gross  
7 manipulation with the right hand owing to weakness demonstrated in the right  
8 hand during physical examination. AR 355-56.

9       On April 29, 2014, Dr. Lim examined Plaintiff. AR 358-363. Dr. Lim's  
10 noted that Plaintiff: presented with subjective complaints of vertigo, but with  
11 no recent episodes associated therewith; underwent surgery on her right  
12 shoulder and presented with a well-healed scar, but alleged continuing pain  
13 with motion and decreased range of motion in the right shoulder; presented  
14 with back pain on motion, but without a limitation in the range of motion and  
15 no signs of radiculopathy; presented with signs of likely diabetic neuropathy;  
16 and had a slow and unsteady gait, but did not require the use of assistive  
17 devices with ambulation. AR 361. Dr. Lim assessed that Plaintiff: could stand  
18 and/or walk about six hours in an eight-hour workday with appropriate  
19 breaks; could sit for six hours in an eight-hour day with appropriate breaks;  
20 could lift and/or carry 20 pounds occasionally and 10 pounds frequently;  
21 could only push, pull, and overhead reach with her right upper extremity  
22 occasionally; had postural limitations including occasional climbing and  
23 crouching; and should avoid unprotected heights. Id.

24       2. The ALJ's Treatment of the Opinions of Drs. Sargeant and Lim

25       The ALJ accorded partial weight to Dr. Sargeant's opinion, observing  
26 that "Dr. Sargeant's manipulative limitations are overly restrictive in light of  
27 the clinical and diagnostic findings discussed above and the conservative  
28 treatment received for the right upper extremity." AR 36. The ALJ similarly

1 accorded partial weight to the opinion of Dr. Lim as the doctor's suggested  
2 "manipulative limitations are also overly restrictive and not supported by the  
3 clinical findings discussed above." Id.

4 Other than referring generally to unspecified findings "discussed above,"  
5 the ALJ did not cite to any evidence in support of her conclusions. As noted,  
6 the only opinions which were affirmatively rejected related to "manipulative  
7 limitations" of the right upper extremity. However, the ALJ does not address  
8 the many significant areas in which the two consulting physicians' opinions  
9 contradict each other. For example, Dr. Sargeant concluded that Plaintiff was  
10 incapable of standing or walking for greater than two hours in an eight-hour  
11 work day (AR 355), whereas Dr. Lim found Plaintiff would be able to stand  
12 and/or walk for "about 6 hours in an eight-hour workday with appropriate  
13 breaks" (AR 361). Dr. Sargeant opined that Plaintiff required the use of an  
14 assistive device for walking long distances (AR 355), while Dr. Lim found  
15 Plaintiff "does not require the use of assistive devices for ambulation" (AR  
16 361). Dr. Sargeant concluded Plaintiff could push and pull frequently (AR  
17 355), but Dr. Lim found Plaintiff was limited to only occasional pushing,  
18 pulling, and reaching with the right upper extremity. Id.<sup>2</sup>

19 In setting forth Plaintiff's RFC, the ALJ implicitly adopted some  
20 portions of each examining physician's functional assessments, but implicitly  
21 rejected others, without discussion. AR 32. For example, the RFC mirrors Dr.  
22 Sargeant's limitations relative to lifting and carrying. AR 32, 355. The RFC  
23 reflects Dr. Lim's standing, walking, and sitting limitations by concluding that  
24 Plaintiff "can sit, stand, or walk for up to six hours each in an eight-hour day,"

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26 <sup>2</sup> Though Dr. Sargeant did not opine specifically on reaching, in describing the  
27 results of Plaintiff's shoulder examination Dr. Sargeant described that Plaintiff could  
28 not "flex more than 30 to 40 degrees[,] [a]bduction is 20 to 30 degrees and she cannot  
pas[s] the midline for extension because of pain." AR 354.

1 but departs from Dr. Sargeant's limitation of being able to stand or walk no  
2 more than two hours in an eight-hour day. AR 32, 355, 361. And the RFC  
3 limitation that Plaintiff can "engage in frequent reaching with the right upper  
4 extremity" is directly at odds with Dr. Lim's limitation to occasional use of the  
5 right upper extremity for, inter alia, reaching. AR 32, 361. The ALJ failed to  
6 explain or justify why she chose some limitations over others.

7 "Where an ALJ does not explicitly reject a medical opinion or set forth  
8 specific, legitimate reasons for crediting one medical opinion over another, he  
9 errs." Garrison v. Colvin, 759 F.3d 995, 1012 (9th Cir. 2014) (citing Nguyen v.  
10 Chater, 100 F.3d 1462, 1464 (9th Cir. 1996)). The ALJ can meet the requisite  
11 specific and legitimate standard "by setting out a detailed and thorough  
12 summary of the facts and conflicting evidence, stating his interpretation  
13 thereof, and making findings." Reddick, 157 F.3d at 725.

14 Here, the Commissioner concedes, the ALJ "did not specifically address  
15 all of the" limitations set forth by Drs. Sargeant and Lim. Jt. Stip. at 7. The  
16 Commissioner argues that the Court should absolve that failure because "it is  
17 clear" from other portions of the decision that the ALJ "rejected those  
18 limitations as unsupported by the evidence." Id. This assertion fails for two  
19 reasons. First, it is not clear that the Commissioner rejected "those limitations"  
20 because, as noted above, the limitations set forth by Drs. Sargeant and Lim  
21 were not consistent; some were accepted into the RFC, some were not, and  
22 only one type – "manipulative limitations" – was expressly addressed as a  
23 reason to accord only partial weight to the opinions. AR 36. In not even  
24 recognizing the inconsistencies in the limitations set forth by Drs. Sargeant and  
25 Lim, the ALJ failed to provide "legitimate reasons for crediting one medical  
26 opinion over another" and erred.

27 Second, even with respect to the one area of limitation that the ALJ did  
28 address in deciding to accord only partial weight to the opinions of Drs.

1 Sargeant and Lim, the ALJ's analysis lacks the requisite specificity. The basis  
2 provided for rejecting the "manipulative limitations" proffered by both  
3 examining physicians was the conclusion that the limitations were inconsistent  
4 with the clinical and diagnostic findings "discussed above." AR 36. However,  
5 the Court notes that in the ALJ's recitation of clinical and diagnostic findings,  
6 the findings from the treatment notes of Drs. Sargeant and Lim predominate.  
7 See AR 33-36. While it is true an ALJ "need not discuss all evidence presented  
8 . . . [he or she] must explain why significant probative evidence has been  
9 rejected." Diedrich v. Berryhill, 699 F. App'x 726, 726 (9th Cir. 2017) (citing  
10 Vincent on behalf of Vincent v. Heckler, 739 F.2d 1393, 1394-95 (9th Cir.  
11 1984) (per curiam)).

12 The ALJ's apparent unexplained rejection of at least one aspect of Dr.  
13 Lim's opinion had a significant impact on the outcome. Specifically, asked to  
14 assume a limitation of only "occasional reaching with the right upper  
15 extremity," consistent with Dr. Lim's opinion, the VE testified that such a  
16 limitation would preclude Plaintiff from performing her past work and the  
17 alternative occupations. AR 63, 361. The ALJ ultimately concluded that  
18 Plaintiff was capable of "frequent reaching in all directions with the upper  
19 extremity."<sup>3</sup> AR 32 (emphasis added). Thus, adopting Dr. Lim's  
20 recommendation of only occasional use of the right upper extremity for  
21 reaching could have altered the ultimate opinion of disability.

22 The Court has considered the Commissioner's arguments in support of  
23 the ALJ's decision (Jt. Stip. at 6-7), but finds they do not address the failures  
24 set forth above.

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26 <sup>3</sup> "Occasional" means from very little to up to one-third of the time, where  
27 "frequent" means occurring from one-third to two-thirds of the time. SSR 83-10,  
28 1983 WL 31251, at \*5, 6.

1       The Court finds that the ALJ erred in not setting forth specific and  
2 legitimate reasons supported by substantial evidence in the record in partially  
3 rejecting the opinions of examining physicians. This error was not harmless  
4 and was not inconsequential to the ALJ's determination that Plaintiff was not  
5 disabled. Molina, 674 F.3d at 1115 (9th Cir. 2012).

6       **C. Remand is Appropriate**

7       The decision whether to remand for further proceedings is within this  
8 Court's discretion. Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000)  
9 (as amended). Where no useful purpose would be served by further  
10 administrative proceedings, or where the record has been fully developed, it is  
11 appropriate to exercise this discretion to direct an immediate award of benefits.  
12 See Benecke v. Barnhart, 379 F.3d 587, 593 (9th Cir. 2004); Harman, 211 F.3d  
13 at 1179 (noting that "the decision of whether to remand for further proceedings  
14 turns upon the likely utility of such proceedings"). A remand is appropriate,  
15 however, where there are outstanding issues that must be resolved before a  
16 determination of disability can be made and it is not clear from the record that  
17 the ALJ would be required to find the claimant disabled and award disability  
18 benefits. See Bunnell v. Barnhart, 336 F.3d 1112, 1115-16 (9th Cir. 2003).

19       The Court finds that the ALJ committed reversible error by failing to  
20 provide specific and legitimate reasons for rejecting the opinions of examining  
21 physicians. Remand for further administrative proceedings is appropriate for  
22 the ALJ to fully and properly consider the opinions of examining physicians  
23 and assess which of the physicians' limitations should be adopted as a part of  
24 Plaintiff's RFC, and for opinions that are rejected, to provide specific and  
25 legitimate reasons supported by substantial evidence in rejecting the  
26 contradicted opinions of examining physicians.

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28       ///

V.

## ORDER

Pursuant to sentence four of 42 U.S.C. § 405(g), IT THEREFORE IS ORDERED that Judgment be entered reversing the decision of the Commissioner of Social Security and remanding this matter for further administrative proceedings consistent with this Order.

Dated: February 20, 2018

  
John D. Early  
United States Magistrate Judge